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No. 94-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

QUANTUM CHEMICAL CORPORATION and
QUANTUM EMPLOYEE STOCK OWNERSHIP PLAN
FOR HOURLY EMPLOYEES,
Petitioners,

v.

RUSSELL WULF, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Should this Court intervene to resolve a conflict among the Circuits concerning whether a retirement plan invokes a deferential standard of review if it grants fiduciaries such authority as "conclusive" decision-making power "as to any disputed question"?

2. Should a court disregard relevant Internal Revenue Service positions when it reviews an interpretation of a retirement plan intended to qualify for tax-favored treatment under the Internal Revenue Code?

PARENTS AND SUBSIDIARIES

Quantum Chemical Corporation is a subsidiary of parent corporation Hanson, America, which, in turn, is a subsidiary of Hanson PLC, a British Corporation. Quantum Chemical Corporation has no subsidiaries that are not wholly owned by Quantum.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Quantum Chemical Corporation and Quantum Employee Stock Ownership Plan for Hourly Employees respectfully pray that the Supreme Court of the United States grant a writ of *certiorari* to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered on June 15, 1994, for which rehearing was denied on July 27, 1994.

OPINIONS BELOW

The majority and minority opinions of the United States Court of Appeals for the Sixth Circuit are reported as *Wulf v. Quantum Chemical Corporation*, 26 F.3d 1368 (6th Cir. 1994). (App. 1a) The district court's judgment, which was written but not reported, was entered

on December 11, 1992. (App. 24a) The United States Court of Appeals for the Sixth Circuit entered an order denying the Petitioners' Petition for Rehearing on July 27, 1994. (App. 32a)

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 15, 1994.

The order of the United States Court of Appeals for the Sixth Circuit denying the Petitioners' Petition for Rehearing was entered on July 27, 1994.

This Court has jurisdiction to hear this case pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

STATUTE INVOLVED

29 U.S.C. § 1132(a)(1)(B) Civil Enforcement

(a) A civil action may be brought—

(1) by a participant or beneficiary

. . .

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

STATEMENT OF THE CASE

I. Facts

Quantum Chemical Corporation ("Quantum") operated a plant in St. Bernard, Ohio, as part of its Emery Division. (App. 2a) On January 28, 1988, Quantum adopted several employee stock ownership plans, to give its hourly employees an additional retirement benefit based on the financial performance of the company. During that period, the plaintiffs in this case, who were union-represented

employees at the St. Bernard plant, were participants in the Quantum Employee Stock Ownership Plan for Hourly Employees (the "Plan"). (App. 2a) Quantum provided this Plan coverage at no cost to the plaintiffs: they were not asked to contribute, and their bargaining unit was not asked to surrender any other benefits at the bargaining table.

The Plan is a tax-qualified retirement plan under § 401(a) of the Internal Revenue Code ("Code") and a pension plan subject to the Employee Retirement Income Security Act of 1974 ("ERISA"). Section 8.01 of the Plan provides that it is administered by a Committee of not less than three members. Section 8.07 of the Plan expressly provides that "the Committee from time to time shall establish rules for the administration of the Plan and the transaction of its business. The determination of the Committee as to any disputed question shall be conclusive." (App. 8a) Section 10.01 of the Plan provides that it "shall be construed . . . under ERISA."

On March 11, 1989, Quantum entered into an agreement to sell the assets of its Emery Division plant in St. Bernard, Ohio, to Henkel Corporation ("Henkel"), effective April 17, 1989. (App. 2a) Section 1 of the Employee Agreement, entered into as a supplement to the asset sale agreement, expressly required Henkel to offer employment to all employees of the St. Bernard facility and to assume the collective bargaining agreement covering hourly union employees at the plant. In addition, pursuant to Section 3(c) of the Employee Agreement, Henkel was required to cause either new or existing trusts funding employee benefit plans to accept transfers of assets and liabilities of all of Quantum's retirement plans attributable to the transferred employees. (App. 2a-3a) After the sale, Henkel continued to operate the St. Bernard plant as a going concern.

The plaintiffs accepted Henkel's employment offer. They continued their employment at the St. Bernard plant

after the sale, as employees of Henkel, in the same jobs and with the same job duties, the same supervisors, and the same hourly wage as they had with Quantum on the previous day. (App. 3a)

After the sale closed on April 17, 1989, and during efforts to complete the transition, Henkel began to resist a transfer of assets from the Plan, even though it proceeded with plan-to-plan transfers from all other Quantum plans. By mid-June of 1989, Henkel announced its refusal to accept transfer. (App. 3a) The Committee determined, that the transferred employees had not experienced a "termination of employment" within the meaning of the Plan. On December 14, 1989, after obtaining Internal Revenue Service approval of the Plan, Quantum's Board of Directors adopted an amendment, retroactively effective to April 15, 1989, that would permit, at the Committee's discretion, distributions to Plan participants involved in a division sale. (App. 3a)

On or about October 10, 1989, Quantum distributed forms to the affected participants on which they could either elect a lump sum payment of their Plan accounts in cash or in stock or elect to retain their accounts in the Plan. (App. 3a) The named plaintiffs elected a lump sum payment in cash. (App. 3a) The final valuation of the accounts for all participants who elected distribution was made on October 31, 1989. (App. 3a) From April 1989 to October 1989, the market price of Quantum shares had dropped substantially.

II. Proceedings Below

Russell A. Wulf and Ronald Rentschler filed this class action in the United States District Court for the Southern District of Ohio under Section 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B), alleging that the sale of Quantum's Emery Division to Henkel resulted in their "termination of employment" within the meaning of the Plan and entitled them to distributions as of April

1989. The district court had subject matter jurisdiction pursuant to both ERISA's jurisdictional provision, 29 U.S.C. § 1132(e), and general federal question jurisdiction, 28 U.S.C. § 1331. The parties filed cross-motions for summary judgment. On December 11, 1992, the district court denied the class' motion, granted Quantum's and the Plan's motion, and dismissed the action. The district court ruled that the Plan's terms, the Code, ERISA, and judicial authority did not provide for a distribution upon the Emery sale. In so holding, the district court followed the Internal Revenue Service's ("Service") "same desk rule" to find that "[t]he transfer of a subsidiary or a division in which the employees retain the same job responsibilities, wage, supervisor, etc., is not a 'termination of employment.'" (App. 28a)

The class appealed to the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit"). On June 15, 1994, a divided panel of the Sixth Circuit reversed the grant of summary judgment to Quantum and the Plan and remanded the case with directions to enter summary judgment for the class. (App. 20a) The majority held that the Plan did "not clearly give the Committee that degree of discretion required to invoke deference to the administrator's interpretation of 'termination of employment'" under this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 401 (1989) and subsequent Sixth Circuit authority. (App. 8a-9a) The majority applied a de novo standard of review and concluded that, although the term "termination of employment" was ambiguous and both parties had offered plausible interpretations of the Plan language, the class' interpretation was the "legally correct" one. (App. 15a-17a) The majority, therefore, held that the class had, in fact, "terminated employment" within the meaning of the Plan as of the date of the sale of the Emery Division. In reaching its conclusion, the majority rejected the applicability of the Service's "same desk rule," stating:

> Employers who establish an employee benefit plan subject to ERISA must be aware of tax consequences and must obtain Internal Revenue Service approval of certain features of the plan. This does not mean, however, that tax rulings concerned with treatment of an uncontested right to receive distributions are controlling, or even particularly helpful, in deciding the question of whether the employee is, in the first place, entitled under provisions of a plan to receive the distribution.

(App. 13a) On July 27, 1994, the Sixth Circuit denied Quantum's and the Plan's Petition for Rehearing and Suggestion for Rehearing En Banc. (App. 32a)

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO PLAN LANGUAGE REQUIRED TO INVOKE A DEFERENTIAL STANDARD OF REVIEW.

More than five years have passed since this Court issued its decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989). In adopting a two-pronged standard of judicial review for ERISA plan-interpretation decisions, the Court set out to guide courts, plan administrators, and litigants toward a more orderly and consistent system to develop a "body of Federal substantive law . . . to deal with issues involving rights and obligations under private welfare and pension plans." *Id.* at 110-11 (quoting 129 Cong. Rec. 29,942 (1974) (statement of Sen. Javits)). The result, however, has been anything but orderly or consistent. The applicable "body of Federal law" has been dismembered.

In parsing plan language that could invoke a deferential review of plan-fiduciary decisions, the Circuits have produced conflicting expressions of the appropriate test, conflicting rules of construction, and conflicting results under similar plan language. Given the *Bruch* developments to date, the Circuits are compounding, not re-

solving, their differences. Without additional guidance from this Court, the Circuits will remain in fundamental conflict on this important issue of ERISA policy. In addition, that conflict will continue to plague sponsors and fiduciaries of hundreds of thousands of plans (*see* page 16, n.3 *infra*)—sponsors and fiduciaries who are confronted with the ERISA-imposed duty to comply with the terms of their plans, the draconian Code-based threat of plan disqualification, and the reality of burgeoning employee litigation.

A. *Bruch*, Itself.

In *Bruch*, this Court ruled that the decisions of plan fiduciaries should be accorded deference if the plan's language evidenced the necessary grant of decision-making authority of the fiduciaries. The Court noted examples of plan terminology that demonstrated the requisite decision-making authority:

> "any construction [of the agreement's provisions] adopted by the Trustees in good faith shall be binding"—*id.* at 111;
>
> "power to construe uncertain terms"—*id.* at 111;
>
> "eligibility determinations are to be given deference" —*id.* at 111;
>
> "discretionary . . . authority to construe uncertain terms"—*id.* at 112;
>
> "final authority to construe uncertain terms"—*id* at 112;
>
> "discretionary authority to determine eligibility for benefits"—*id* at 115;
>
> "discretionary authority . . . to construe the terms of the plan"—*id.* at 115.

The Court did not create any presumptions or artificial evidentiary barriers to hinder plan sponsors from choosing deferential review. Nor did the Court find any particular language to be wanting; the informal severance plan at issue contained "no evidence" of fiduciary decision-making

power. *Id.* at 111. Instead, quoting the Restatement (Second) of Trusts § 4, Comment d (1959), it recognized that "[t]he terms of trusts created by written instruments are "determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible." *Id.* at 112.

B. The "Magic Words" Line.

Several Circuits have recognized that "[t]he Court in *Firestone* surely did not suggest that 'discretionary authority' hinges on incantation of the word 'discretion' or any other 'magic word.'" *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992). Despite paying lip service to that theme, the Sixth Circuit, and a few other Circuits, have come preciously close to just that standard.

In the decision below, the Sixth Circuit articulated a high burden to invoke deferential review, announcing that the grant of authority must be both clear and exceptional. Citing *Anderson v. Great West Life Assur. Co.*, 942 F.2d 392, 395 (6th Cir. 1991), the court announced this test:

> This court has read *Firestone v. Bruch* to hold that discretion is the exception, not the rule and that the arbitrary and capricious standard does not apply unless there is a *clear* grant of discretion to determine benefits or interpret the plan.

(App. 8a, emphasis supplied)

Quantum's Plan easily demonstrates that the settlor had granted broad decision-making authority to the Plan fiduciary. Article 8 of the Plan, entitled "Administration of the Plan," placed in the Committee the "general administration of the Plan and the responsibility for carrying out the provisions of the Plan," and it authorized the Committee to "allocate among themselves all or such portion of their duties . . . as they, in their sole discretion, shall decide." (Sections 8.01 and 8.02, App. 22a) Sec-

tion 8.07, entitled "Establishment of Rules," added the following:

> Subject to the limitations of the Plan, the Committee from time to time shall establish rules for the administration of the Plan and the transaction of its business. *The determination of the Committee as to any disputed question shall be conclusive.* (App. 8a, emphasis added)

Even though the Plan placed no limits whatsoever on the Committee's rule-making authority, except that it not contravene the terms of the Plan, itself, the court below found that the Plan provision "does not clearly give the committee that degree of discretion required to invoke deference." (App. 8a-9a)

In addition, Section 10.04 of the Plan gave the Committee authority to decide what information would be necessary to establish a participant's Plan rights and benefits:

> Each Member or other person entitled to a benefit, before any benefit shall be payable to him or on his account under the Plan, shall file with the Committee the information that it shall require to establish his rights and benefits under the Plan.

Although the court below did not cite that section, it did review other Plan sections, finding that "[n]one of these provisions contains any discretionary language." (App. 8a)

Apparently acknowledging that the Quantum Plan did effectively grant discretion at times, the court below dismissed that evidence of intention with a comment that "[a] plan can give an administrator discretion with respect to some decisions, but not others." (App. 8a) For some, in fact, similar logic has even led to a negative inference: "the settlor's express grant of discretion in certain areas . . . and silence as to others strongly supports the conclusion [that discretion was not intended]." *Luby v. Teamsters Health, Welfare and Pension Trust Funds,* 944 F.2d 1176, 1181 (3d Cir. 1991).

Some Circuits, in fact, have gone so far as to adopt the plan interpretation doctrine of *contra proferentem*, from state law insurance doctrines, favoring the "interpretation that is most favorable to the insured" so that "any ambiguity will be resolved against the drafter." *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 540 (9th Cir.) *cert. denied*, 489 U.S. 1013 (1909); *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257 (3d Cir. 1993).

Although earlier decisions from the Sixth Circuit indicated a more reasonable application of *Bruch*[1], that Circuit has now shifted toward a very high standard for invoking deferential review. *Tiemeyer v. Community Mutual Ins. Co.*, 8 F.3d 1094, 1099 (6th Cir. 1993), *cert. denied*, —— U.S. ——, 114 S. Ct. 1371 (1994) ("Though the instant Plan provides . . . the right to *decide* coverage questions, the Plan does not grant *discretionary authority*); *Anderson v. Great West Life Assur. Co.*, 942 F.2d at 395 (Plan gave insurance company the right to determine the amount of the benefits to which any Participant may become entitled under the Plan").

The *Bruch* cases are legion, and several Circuits have developed inconsistent internal precedent. The following decisions, however, represent Circuits, in addition to the Sixth, that generally apply an exceedingly high standard of fiduciary authorization. They all deny deferential review despite the plan language indicated:

Third Circuit

> *Luby v. Teamsters Health, Welfare and Pension Trust Funds*, 944 F.2d at 1180-81 (plan authorized trustees to "decide upon a program for payment of benefits," gave them "discretion to

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[1] *Johnson v. Eaton Corp.*, 970 F.2d 1569 (6th Cir. 1992); *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244 (6th Cir. 1991).

amend," and "expressly granted Trustees discretionary authority in a number of specified areas")

Heasley v. Belden & Blake Corp., 2 F.3d at 1254 (plan provided that the administrator "will evaluate the proposed admission for certification of medical necessity and appropriateness under the terms of the Master Group Policy")

Eighth Circuit

Baxter v. Lynn, 886 F.2d 182, 188 (8th Cir. 1989) ("plan provides that the trustees have the final authority to determine all matters of eligibility for the payment of claims. As noted above, this section merely describes the trustees' mandatory role in accepting or rejecting claims submitted to the Fund. It does not grant to the trustees the authority to construe ambiguous terms.")

Eleventh Circuit

Guy v. Southeastern Iron Workers' Welfare Fund, 877 F.2d 37, 39 (11th Cir. 1989) ("plan confers upon the trustees 'full and exclusive authority to determine all questions of coverage and eligibility' and 'full power to construe the provisions of [the] Trust' ")

Kirwan v. Marriott Corp. 10 F.3d 784, 788-89 (11th Cir. 1994) (plan "provides that . . . the Named Fiduciary, has 'authority to control and manage the operation and administration of the Plan.' Although the Plan does not specifically grant the Administrator the authority to deny claims, the benefit claim procedure described in the Plan contemplates that the Administrator will perform that function. Finally, . . . the Plan provides: 'The administrator may promulgate such rules and regulations as deemed necessary and proper to interpret or administer the Plan.' ")

C. The "Common Sense" Line.

Several Circuits, on the other hand, have refused to adopt a "magic words" approach or any other artificial barriers to settlor intent. In *De Nobel v. Vitro Corp.*, 885 F.2d 1180 (4th Cir. 1989), the Fourth Circuit responded to the employee's contention that the word "discretion" did not appear in the plan:

> We perceive no principled basis, however, on which we could engage in semantic hairsplitting of that sort. There are obviously no magic words required to trigger the application of one or another standard of judicial review.

Id. at 1187. Preferring a "common sense understanding of the principles enunicated in *Bruch*," *id.* at 1187, the court found the plan's language sufficient:

> [T]he Committee shall have such powers as may be necessary to carry out the provisions of the Plan and to perform its duties hereunder, including, without limiting the generality of the foregoing, the power: . . . To determine all benefits and resolve all questions pertaining to the administration, interpretation and application of Plan provisions, either by rules of general applicability or by particular decisions . . . .

Id. at 1186. The Fourth Circuit had little problem with this issue, noting that "we have before held that language far less broad than that invoked here vests in plan fiduciaries a sufficient measure of discretionary authority." *Id.* at 1187. The reference was to *Boyd v. United Mine Workers Health & Retirement Funds*, 873 F.2d 57, 59 (4th Cir. 1989) (plan gave administrators the power of "full and final determination as to all issues concerning eligibility for benefits" and the authority "to promulgate rules and regulations to implement" the plan). Given the similarity of the Quantum Plan's language, there can be little doubt that the instant case, if decided by the Fourth Circuit, would have turned out far differently.

Several other Circuits have joined the Fourth Circuit in rejecting a "magic words" analysis and taking a more

"common sense" approach to the *Bruch* standard. The following cases, with the relevant plan provisions, are representative of those Circuits:

District of Columbia Circuit

Block v. Pitney Bowes, Inc., 952 F.2d at 1452-53 (plan vests in the Administrative Committee power "to interpret and construe the Plan, [and] to determine all questions of eligibility and the status and rights of Participants")

First Circuit

Curtis v. Noel, 877 F.2d 159, 161 (1st Cir. 1989) (plan provides that the administrator shall determine "which Employees are eligible to participate in the Plan" and shall "provide all parties dealing with the Plan an interpretation of Plan provisions on request")

Fifth Circuit

Lowry v. Bankers Life & Casualty Retirement Plan, 871 F.2d 522, 524 (5th Cir. 1989) (Retirement Plan gives committee the power to "determine all questions arising" in the administration of the Plan, "including the power to determine the rights or eligibility of Employees and Participants and their beneficiaries, and the amounts of their respective interests" and provides that "Committee determinations are binding on all persons")

Wildbur v. ARCO Chemical Co., 974 F.2d 631 (5th Cir.), *modified*, 979 F.2d 1013 (5th Cir. 1992) (plan says that after reviewing the evidence it believes necessary, the administrator "shall make an independent determination of the applicant's eligibility for benefits under the Plan" and that decision "shall be final and conclusive upon all persons if supported by substantial evidence in the record")

Duhon v. Texaco, Inc., 15 F.3d 1302, 1305 (5th Cir. 1994) (plan states that "[t]he deci-

sions of the Plan Administrator shall be final and conclusive with respect to every question which may arise relating to either the interpretation or administration of this Plan" and that "the Plan Administrator will make the decision to authorize or deny payments")

Seventh Circuit

Donato v. Metropolitan Life Ins. Co., 19 F.3d 375, 379 (7th Cir. 1994) (plan states that MetLife will pay long-term disability benefits "upon receipt of proof, but that [a]ll proof must be satisfactory to us")

Fuller v. CBT Corp., 905 F.2d 1055, 1058 (7th Cir. 1990) (plan empowers trustees "to construe and interpret the plan" but provides that they "shall have no power to add to, subtract from or modify any of the terms of the plan")

Bali v. Blue Cross & Blue Shield Ass'n, 873 F.2d 1043, 1047 (7th Cir. 1989) (plan provided that disability would be "determined on the basis of medical evidence satisfactory to the Committee")

Tenth Circuit

Winchester v. Prudential Life Ins. Co., 975 F.2d 1479, 1483 (10th Cir. 1992) (plan summary stated that the "Claim Administrator[] determines the benefits for which an individual qualifies under the Benefit Plan" and that "the insurance company has the exclusive right to interpret the provisions of the Plan, [and] its decision is conclusive and binding")

Pratt v. Petroleum Production Management Inc. Employee Savings Plan & Trust, 920 F.2d 651, 657 (10th Cir. 1990) (plan gave committee power to "construe and interpret the Plan in accordance with uniform rules and regulations

> . . . , decide the eligibility of any persons to be covered under the Plan in accordance with the Plan . . . [and] determine the right of any person to a benefit, in accordance with the Plan")

Despite several years of extensive development in the Courts of Appeals, the unfortunate fact is that the *Bruch* standard has split along two rapidly diverging lines.[2] In the Sixth Circuit, and a few others, plan sponsors have been frustrated in their obvious effort to provide their fiduciaries with deferential review. As exemplified by the decision below, they have been told, in a few Circuits, that it is not good enough to grant "conclusive" decision-making authority "as to any disputed question." This Court should grant *certiorari* to revisit *Bruch* and to purge the *contra proferentem* doctrine and other artificial presumptions established to frustrate settlor intent. The Court should return this area of law to the "common sense" rule and allow a settlor to ensure deferential review by evidencing an intent to grant the fiduciary decision-making authority. Only then will the courts be relieved of the ever-growing body of litigation, brought in the name of *Bruch*, to second-guess the reasonable exercise of plan fiduciary discretion.

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[2] In addition to the issue raised by this case, the Circuits have split over two other *Bruch* issues. "There is a split among the circuits as to whether a *de novo* review should include facts not before the plan administrator." *Quesinberry v. Life Insurance Co. of North America*, 987 F.2d 1017, 1022-25 (4th Cir. 1993). *Compare Moon v. American Home Assurance Co.*, 888 F.2d 86 (11th Cir. 1989) (review not limited to facts before plan administrator); *with Perry v. Simplicity Engineering, Div. of Lukens General Industries, Inc.*, 900 F.2d 968 (6th Cir. 1990) (review limited to those facts). There is also a split on the issue of whether *Bruch* applies to findings of fact as well as plan interpretations. *Compare Pierre v. Connecticut General Life Ins. Co.*, 932 F.2d 1552, 1556-62 (5th Cir.), *cert. denied*, —— U.S. ——, 112 S.Ct. 453 (1991) (*Bruch* applies to fact determinations); *with Reinking v. Philadelphia American Life Ins. Co.*, 910 F.2d 1210 (4th Cir. 1990) (*Bruch* does not apply).

II. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE CONFLICT CONCERNING THE SIGNIFICANCE OF THE INTERNAL REVENUE CODE AND INTERNAL REVENUE SERVICE POSITIONS IN INTERPRETING TAX-QUALIFIED RETIREMENT PLANS UNDER ERISA.

As recognized by this Court, one of the overriding purposes of ERISA is to create a comprehensive, uniform federal scheme for the regulation of employee benefit plans. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987). The individuals and entities charged with the administration of the more than 700,000 [3] qualified retirement plans rely upon, and are controlled by, this uniform federal scheme. When federal courts interpret ERISA plans, however, the relevance of the Code and its interpretive rulings and regulations has been far from uniform. As noted by the Ninth Circuit as early as 1987, "[t]he significance of tax exemption requirements in resolving an ERISA dispute is unclear." *Fielding v. International Harvester Co.*, 815 F.2d 1254, 1257 (9th Cir. 1987). That significance remains unclear today.

To date, the Second, Third, Fourth, Fifth, Sixth, Ninth and Tenth Circuits have addressed the plan-interpretation significance of Service regulations and rulings. The Second, Fourth, Ninth and Tenth Circuits, as well as panels of the Fifth and Sixth Circuits, have recognized the important guidance to be gleaned from the Code and from Service rulings and regulations when determining the meaning of an ERISA plan.[4] On the other hand, the Third

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[3] U.S. Dept. of Labor/Pension and Welfare Benefits Administration, Private Pension Plan Bulletin Abstract of 1991 Form 5500 Annual Reports—Preliminary 1991 (Summer 1994).

[4] *See O'Neil v. Retirement Plan for Salaried Employees of RKO General, Inc. and Certain Subsidiary Companies*, No. 93-9038, 1994 U.S. App. LEXIS 27083 (2d Cir. Sept. 26, 1994); *Modzelewski v. Resolution Trust Corp.*, 14 F.3d 1374 (9th Cir. 1994); *Amato v.*

Circuit, and now the Sixth Circuit in this case, have discounted those regulations and rulings as relevant only to the tax-exempt status of an ERISA plan.[5] To add to the quagmire, a panel of the Sixth Circuit, as well as a panel of the Fifth Circuit, have indicated that Service regulations and rulings may be relevant only to an ERISA plan's tax status, unless the plan indicates that the term in question is to be interpreted in light of the Code and the Service's regulations and rulings (or the parties agree to such an interpretation).[6]

For example, the Second, Third and Sixth Circuits, in deciding whether an ERISA retirement plan was "partially terminated" for plan purposes, reached differing conclusions regarding the role of the Code and its interpretive rulings and regulations. The Second Circuit in *Amato v. Western Union International, Inc.* stated:

> The district court proceeded on the assumption that whether a plan amendment has effected a partial termination must be determined by principles of contract interpretation, not tax rulings, and sua sponte held as a matter of law that no partial termination had occurred. In doing so, it expressly took "no view as to whether the . . . Amendment effected a partial termination under the treasury regulations and revenue rulings cited by plaintiffs." . . . In our view this holding was error, requiring reversal.

Western Union International, Inc., 773 F.2d 1402 (2d Cir. 1985) *cert. dismissed*, 474 U.S. 1113 (1986); *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985); *U.A.W. v. Dyneer Corp.*, 747 F.2d 335 (6th Cir. 1984); *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805 (10th Cir. 1984); *Dennard v. Richards Group, Inc.*, 681 F.2d 306 (5th Cir. 1982).

[5] *See* (App. 13a); *United Steelworkers of America, AFL-CIO and its Local 4805 v. Harris & Sons Steel Co.*, 706 F.2d 1289 (3d Cir. 1983).

[6] *See Kreis v. Charles O. Townley, M.D. & Associates, P.C.*, 833 F.2d 74 (6th Cir. 1987); *Craig v. Bemis Co.*, 517 F.2d 677 (5th Cir. 1975).

773 F.2d at 1415. In sharp contrast, the Third Circuit in *United Steelworkers of America, AFL-CIO and its Local 4805 v. Harris & Sons Steel Company* rejected the applicability of Service rulings and regulations and found that "[t]he question whether under the terms of the Plan agreement there was a partial termination . . . is essentially one of contract interpretation." 706 F.2d at 1299. The Sixth Circuit, in *Kreis v. Charles O. Townley, M.D. & Associates, P.C.*, although it applied the Code and Service interpretations, apparently would not have done so had the parties not agreed to their relevance:

> It is important to note that, in the absence of agreement between the parties that the use of the term "partial termination" in the Plan was meant to adopt the "partial termination" standards in the Internal Revenue Code, the Internal Revenue Code standards might be irrelevant.

833 F.2d at 79, n. 10 (citing *Harris & Sons Steel Co.*, 706 F.2d at 1297-99).

Thus, there is conflicting jurisprudence, both direct and in principle, on the significance of tax exemption requirements in interpreting ERISA plans. This conflict arises not only among the Circuits, but among different panels of the same Circuit as well. This issue has been thoroughly examined by the lower courts and is now ripe for review in this Court. Without this Court's intervention, the lower courts will remain in a state of confusion on this important issue.

As this Court has stated, to decide ERISA issues by pretending that the Code and the Service do not count is "to embark upon a voyage without a compass." *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1991). To reject the guidance of the Code and the Service, as did the majority of the Sixth Circuit in the instant case, is, therefore, fundamentally flawed, for it inexplicably ignores ERISA's historical roots in tax regulation. In the historic 1974 legislation, Title II of ERISA revamped the tax reg-

ulation of employee retirement plans, and those provisions were codified under Title 26 of the United States Code. 1974 U.S. Code Cong. & Admin. News 1020-1139. Title II of ERISA included major revisions of Code section 401, the Code's primary tax-qualification provision, and many other sectons of Subchapter D, Part I of the Code. In other words, many key Code sections are an integral part of ERISA and must, therefore, be considered in construing an employee benefit plan.[7]

As recognized by the Tenth Circuit in *Crouch v. Mo-Kan Iron Workers Welfare Fund*, 740 F.2d 805, the "enforcement duties and responsibilities under ERISA are divided between the United States Department of Labor and the Internal Revenue Service" and the "applicable laws are set out in 29 U.S.C. § 1001-1144 and in the Internal Revenue Code §§ 401-415." *Id.* at 808. Thus, the "uniform scheme of federal regulation" contemplated under ERISA includes not only the labor provisions in Title 29 of the United States Code, but the tax provisions in Title 26 as well. *See Crouch*, 740 F.2d at 809 (Tenth Circuit used the Code's nondiscrimination and coverage rules for guidance to interpret the coverage of a pension plan). *See also U.A.W. v. Dyneer Corp.*, 747 F.2d 335 (Sixth Circuit analyzed Service positions to determine whether plaintiffs were entitled to early retirement benefits under an ERISA plan).

To require plan administrators to interpret ERISA plans without at least one eye toward the Code's require-

[7] In the instant case, the Service's interpretations of key Code sections breathe meaning into the term "termination of employment." Revenue Ruling 79-336, 1979-2 C.B. 187, and Revenue Ruling 81-141, 1981-1 C.B. 204, applied Code subparagraph 402(e)(4)(A), which was contained in its entirety in Title II of ERISA. 1974 U.S. Code Cong. & Admin. News 1020, 1130-32. Private Letter Ruling 8614060 (June 13, 1986), applied the "same desk rule" under Code section 401(a), which was amended extensively by Title II of ERISA. 1974 U.S. Code Cong. & Admin. News 1020, 1058, 1066-70.

ments creates an irreconcilable conflict for ERISA plan fiduciaries, who must attempt to comply with both statutes. To take the position, as have some Circuits (including the Sixth in the instant case) that the Code and its interpretations must not be relevant to the interpretation of plans, ignores the critical importance of tax-favored treatment for those plans. *See United Steelworkers of America, AFL-CIO and its Local 4805 v. Harris & Sons Steel Company*, 706 F.2d 1289 (Third Circuit stated that fact that there may be a partial termination of a qualified plan for purposes of the Code does not mean that plan was "partially terminated" under its language, as tax precepts governing partial termination serve only a limited purpose); *Craig v. Bemis Co.*, 517 F.2d at 686 ("Fifth Circuit found that [a] specific indication of an intention to use the provisions of the Internal Revenue Code to interpret or define terms of the contract is absent. Given this absence, it seems fairly clear that the tax provisions are relevant only to the tax status of the Plan. . . . [W]e conclude that while the tax status of the Plan may be of concern to the Company and the Commissioner of Internal Revenue, plaintiffs may not predicate their contractually-derived pension rights on the Company's tax exemptions.")

While it is true that the Code does not create substantive, enforceable rights to benefits under ERISA, that is not the point. The point is that Code-influenced vocabulary is the "compass" that plan administrators regularly use to navigate the waters of ERISA. For a court to reject and give no weight to the substantial body of federal law from the Code and the Service is to operate in an environment totally foreign to plan sponsors and fiduciaries, who must live day-to-day with the ever-present risk of plan disqualification. As Judge Kennedy noted in her dissent in the instant case:

> I am unable to agree that the tax cases relied on by the District Court are not helpful. The Internal Revenue Code, subsection 401(a), governs whether an

> employee's stock ownership plan, or any other retirement plan, is qualified for tax-favored status. Plan administrators must comply with Revenue Rulings which do not consider an employee "separated from service" where he or she continues in the same job for another employer. Rev. Rul. 79-336, 1979-2 C.B. 187 and Rev. Rul. 81-141, 1981-1 C.B. 204. The Plan had to comply with tax laws to be approved so contributions could be deductible.

(App. 23a)

The illogical consequences that can result are aptly illustrated by the instant case. In Revenue Ruling 67-213, 1967-2 C.B. 149, the Service ruled that, when funds are transferred directly between the trustees of exempt trusts, both of which form part of qualified plans, the accounts transferred are not treated as having been "distributed" to participants. Quantum and Henkel originally agreed to just such a transfer of the class' assets in the Plan, and Quantum did, in fact, transfer to Henkel assets from its other retirement plans.

Plan-to-plan transfers in corporate asset sales have been common occurrences for the last 27 years. Not only are they permissible under the Code, they are a form of portability that Congress and the Service have clearly preferred in fashioning federal retirement policy. The Sixth Circuit's holding in the instant case, however, necessarily means that Quantum and the Plan fiduciaries *could not have legally transferred the plaintiffs' assets* to a Henkel plan, because the majority concluded that the plaintiffs had an absolute legal right to force a Plan distribution as of the date of the sale. That astounding result, which calls into question the legality under ERISA of almost every plan-to-plan transfer arising out of an asset sale, reveals the fundamental error in the majority's approach.[8]

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[8] That a plan-to-plan transfer, unlike a distribution, would have served a major purpose of the Plan, the Code and ERISA—that is,

The role of an ERISA plan administrator is a daunting one, fraught with pitfalls arising out of the complexities of ERISA and the Code. Under the current confusing state of judicial precedents, ERISA plan administrators have no idea what role, if any, the Code and the Service's rulings and regulations play in interpreting the terms of an employee benefit plan. ERISA plan administrators need this Court's guidance on this critical issue. And plan participants need it, as well; they often face the risk, as here, that an adverse judgment against a plan will reduce the assets available to remaining participants. Without this Court's guidance, they face, as Quantum's fiduciaries and remaining Plan participants have now experienced, the Hobson's choice of potential ERISA liability versus potential plan disqualification.

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preserving Plan accounts to provide retirement income to the plaintiffs *when they reach retirement age*—was another critical factor that the majority below ignored in intepreting the Plan. The Plan is, after all, an ERISA "pension plan," 29 U.S.C. § 1002(2), and it explicitly recognizes that status in many of its provisions, such as sections 3.03, 7.09, 11.02 and 12.01.

CONCLUSION

For the reasons stated above, Petitioners Quantum Chemical Corporation and Quantum Employee Stock Ownership Plan for Hourly Employees request this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals of the Sixth Circuit.

Respectfully submitted,

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